Petition

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

IN RE: JAMES A. DINNAN,
Petitioner

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner James A. Dinnan prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered November 16, 1981, affirming an order to compel discovery and a judgment of contempt thereon.

QUESTION PRESENTED

Is there a qualified privilege of a university faculty member not to reveal in discovery his confidential vote cast in a peer-review promotion-tenure decision, based upon federal constitutional and evidentiary principles?

PARTIES TO THE PROCEEDINGS

The following persons or entities are parties to the proceedings: James A. Dinnan, Petitioner; Respondents: Maija S. Blaubergs, Board of Regents of the University System of Georgia, Fred C. Davison, Virginia Y. Trotter, Joseph A. Williams, Albert J. Kingston, and W. Louis Bashaw. For the caption of this Petition For a Writ of Certiorari Petitioner has used a version of the style in the cases below (actually two cases were consolidated for appeal), and both cases below are included in this Petition.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 661 F.2d 426 (5th Cir. 1981) (App. A); an earlier, related opinion is reported at 625 F.2d 1146 (5th Cir. 1980) (App. B). The judgments and opinions of the District Court are not reported. (App. D & E).

JURISDICTION

The judgment of the Court of Appeals was rendered on November 16, 1981. Timely Suggestion For Rehearing En Banc was denied on December 17, 1981. (App. C). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. *Federal Rules of Evidence* 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in the rules prescribed by the Supreme Court pursuant to a statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with state law.

2. *Federal Rules of Civil Procedure Rule* 26(a)(b)(1):

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claims or defense of the party seeking discovery or to the claim or defense of any other party,

including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground of objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

STATEMENT OF THE CASE

Maija Blaubergs, a non-tenured assistant professor at the University of Georgia, brought a federal action alleging unlawful discrimination in her failure to be promoted and granted tenure. Federal jurisdiction was invoked under 42 U.S.C. § 1983, and 28 U.S.C. §§ 1331; 1343(3)(4).

James A. Dinnan, petitioner herein, is not a party to the Blaubergs lawsuit. However, Dinnan was one of nine University of Georgia professors who had served on a faculty committee which had considered, and recommended against, Blaubergs' promotion. The function of this committee was consistent with the system for judging promotion-tenure qualifications (known as the "peer-review system") which is prevalent in colleges and universities nationwide.

Nationally the peer-review system commonly employs confidential votes and deliberations. The University of Georgia procedures explicitly provided for such confidentiality, and, in 1977, the University's Vice President for Academic Affairs had recommended that all peer-review committees use a secret ballot to insure the "quality" of academic judgments. Accordingly, Dinnan's committee used a secret ballot; not even the committee members themselves knew who cast a particular vote.

Dinnan's committee had recommended against Blaubergs' promotion by a 6-3 vote; this recommendation was

concurred with by the college Dean and by appellate academic review. Blaubergs deposed some (not all) of the members of the committee, including Dinnan. Dinnan answered every question except one: "How did you vote on Doctor Blaubergs' application for promotion?" However, Dinnan freely discussed the criteria he evaluated in Blaubergs' case. Dinnan testified that his judgment on her promotion was based upon his analysis (under the established university guidelines) of her credentials as reflected in the applicant's own promotion materials presented to the committee. Thus Dinnan has testified that no non-academic or illegal factors influenced his judgment of Blaubergs.

Dinnan refused to reveal his vote on a claim of qualified privilege, explaining that confidentiality was of great value to academic freedom, and Blaubergs' need for the information was not sufficient to overcome the privilege. However, Blaubergs obtained an order compelling Dinnan to answer the question. Upon his failure to comply with this order, Dinnan was found in contempt of court.[1] He was sentended to pay a fine of $100.00 per day

[1] The procedural history of these orders requires explanation. The Motion to Compel Discovery was not served in compliance with the time requirements of *F.R. Civ. Proc.* Rule 6(d); Dinnan's counsel in fact got only one day's notice (the hearing was held over objection). Prior to the hearing on Blaubergs' motion for civil contempt, Dinnan filed a notice of appeal of the order compelling discovery and moved the trial court for a stay (which was denied). The court then declined to find Dinnan in civil contempt, stating that it would hear from him on the Court's own *criminal* contempt proceeding in 24 hours. Dinnan moved for a continuance in order to marshal evidence for this hearing; this was denied and he was found in criminal contempt. This judgment was also appealed, and stays were denied. Dinnan then filed a 28 U.S.C. § 2255 motion alleging an illegal sentence. Ruling on this motion, the trial court found the contempt was civil, not criminal. The issue of timely notice was raised by Dinnan on appeal; however, Dinnan conceded it would be futile to reverse on the procedural point if his substantive point was wholly rejected. Apparently

for 30 days, after which time he was to serve 90 days in jail—all of which was conditioned upon his refusal to testify. Dinnan paid his fine and served his sentence.

The Fifth Circuit Court of Appeals, like the trial court, rejected Dinnan's claim of privilege, holding that the case involved no consideration of academic freedom. Having found no privilege, the Court of Appeals did not balance the interests involved and affirmed the trial court.

REASONS FOR GRANTING THE WRIT

1. This case presents for resolution a crucial and unresolved issue of great importance to the academic community and the courts charged with investigating charges of illegal discrimination in academic employment. In the decade since Title VII of the Civil Rights Act of 1964 was made applicable to colleges and universities the courts have struggled to define judicial standards which will preserve both the rights of litigants and the rights of the academic community. *Compare, e.g., Faro v. New York University,* 502 F.2d 1129 (2d Cir. 1974) *with Powell v. Syracuse University,* 580 F.2d 1150 (2d Cir. 1978). However, in the case at bar the balance between these competing interests has been tilted totally in favor of the litigant. The Fifth Circuit has refused to even consider a claim of privilege based on an infringement of academic freedom, holding instead that a litigant's mere allegation of illegal discrimination eliminates any need to consider the academic freedom interests asserted by Professor Dinnan.

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accepting this concession, the Court of Appeals ignored the procedural deficiencies, which is understandable since the Fifth Circuit in effect ruled that Dinnan could not prevail on any set of law or facts.

Dinnan's claim of privilege derives from the convergence of two recognized legal values: academic freedom and confidentiality. Academic freedom unquestionably has the status of a constitutional right. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978). It is right of "transcendent value" to our nation. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). It is an exercise of academic freedom when a faculty member makes a judgment of "who will teach." *Bakke*, at 312. The professional, academic role of faculty in the standard peer-review promotion-tenure process is in fact so well established and fundamental that it received recognition as a "managerial" function in *NLRB v. Yeshiva University*, ___ U.S. ___, 100 S.Ct. 586 (1980).[2] Faculty participation in the promotion-tenure process is a vital safeguard of the academic environment, which is integrally connected with scholarship and teaching. *See Mayberry v. Dees*, 663 F.2d 502, 514 (4th Cir. 1981). Only faculty can make the necessary academic judgments on promotion and tenure, tenure itself being the cornerstone of academic freedom. *Beitzell v. Jeffrey*, 643 F.2d 870 (1st Cir. 1981).

The peer-review process "typically calls for . . . confidential deliberation." *Beitzell, id.; see Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.) *cert. den.* 434 U.S. 904 (1977). The principle of confidentiality has been recognized as valuable in other, analogous situations.

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[2] There has been some scholarly discussion of "institutional" and "individual" academic freedom. Note, *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045 (1968); Note, *Preventing Unnecessary Instrusions on University Autonomy; A Proposed Academic Freedom Privilege*, 69 Cal. L. Rev. 1538 (1981). However, *Yeshiva* clearly indicates that the "professional" and "institutional" academic interests in college governance cannot be realistically separated.

Generally speaking,

> [h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

United States v. Nixon, 418 U.S. 683, 705 (1973); *cf.* F.R Evid. 606(b) (the "juror's privilege"). The secret ballot's value and privileged status in political and labor elections is well established (this secret ballot privilege was acknowledged in the case at bar, 661 F.2d at 432). The interests served in the academic community by the secret ballot are the same interests protected by the secret ballot in political and labor context: honesty and candor are assured; the threat of pressure and retaliation for a judgment is obviated. Smith, *Protecting the Confidentiality of Faculty Peer-Review Records*, 8 J. Col. & Univ. L. 20 (1981);[3] *see McKillop v. Regents of the University of California*, 386 F.Supp. 1271 (N.D. Cal. 1975). Nothing protects the integrity of the academic judgment in the peer-review process more than does confidentiality and the secret ballot. Yet in the case at bar the Court of Appeals ignored such values and made a spontaneous assumption that confidentiality is of little or no importance to the academic community, audaciously telling educators that their peer-review system will be better off without a secret ballot since "society has no strong interest in encouraging timid faculty members to serve on tenure committees." 661 F.2d at 432.

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[3] Smith also notes that since the procedures of confidentiality are so well established there is a reasonable expectation of privacy in the communications. Compare the privacy cases, *e.g.* Whalen v. Roe, 429 U.S. 589 (1977), and the "common-law" privilege standards in 8 Wigmore, Evidence § 2286 (McNaughton Rev. 1961).

The Court of Appeals decision presents a distortion of the issues involved in this case and thus threatens to establish a dangerous precedent in this important and evolving area of the law.

Dinnan's claim of privilege has always been limited and narrow: he only asserted a qualified privilege which he simply asked to be balanced against the litigant's interests under appropriate standards.[4] This balancing of interests was, in response to the Dinnan appeal, endorsed by the American Association of University Professors. "A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments," *Academe*, February-March 1981, p. 27. However, the Fifth Circuit enunciated no standards; rather, the court decided that all faculty peer-review committee proceedings are open to discovery. This holding is precisely contrary to customary academic practices and expectations, and the issue promises to recur.

The Court of Appeals misconstrued the claim of privilege asserted in this case, misunderstood the nature of academic freedom, and misjudged the importance of confidentiality in academic decisionmaking. The Dinnan opinion will cause much mischief in the courts—and

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[4] Compare the limited privileges in Detroit Edison Co. v. NLRB, 440 U.S. 301 (1978) and Herbert v. Lando, 441 U.S. 153 (1978). Unlike *Herbert*, it was certainly not demonstrated in the case at bar that the denial of access to Dinnan's vote would constitute a substantial interference with Blaubergs' ability to establish a crucial element of her case. Dinnan's vote proves nothing (one can vote for or against someone for legal reasons). The only relevant information is the criteria used by Dinnan in making his judgment—information already provided on deposition. Dinnan's vote was based solely on legal, academic reasons. The Fifth Circuit's opinion excused the court from making even this basic "balancing" of the interests in confidentiality against the need for the information.

distress in the nation's colleges and unversities—unless it is corrected by this Court. This is truly "one of the most important cases in American education." Shanker, "Where We Stand," The New York Times, October 5, 1980.

2. The decision of the Court of Appeals in the case at bar is in conflict with decisions of other federal courts that have decided the same, or nearly the same issues. In *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.) *cert. den.* 434 U.S. 904 (1977), it was held the interest of the College in protecting the confidentiality of faculty evaluation records should be balanced against a Title VII litigant's need for the information. Thus, the "balancing of interests" test sought by Dinnan in the case at bar was endorsed. *Keyes* was followed in principle in the Fifth Circuit in *Jepsen v. Florida Board of Regents*, 610 F.2d 1379 (5th Cir. 1980)[5] and in the Ninth Circuit by *Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981). *Cf. Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*, 71 F.R.D. 388 (N.D. Cal. 1976); *see generally Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

On November 9, 1981, just a week before the date of decision in the case at bar, *Gray v. Board of Higher Education*, ____ F.Supp. ____, 50 U.S.L.W. 2307 (S.D.N.Y. 1981) (App. F) was decided. *Gray* considered the precise issue involved in *Dinnan*, but reached a holding exactly opposite of the Fifth Circuit's *Dinnan*. In *Gray* two pro-

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[5] *Jepsen* allowed discovery of written evaluations; the case involved a state statute requiring confidentiality. *But see* McKillop v. Regents of the University of California, 386 F.Supp. 1271 (N.D. Cal. 1975), protecting academic confidentiality under a similar state statute. Obviously, each case will have its variable elements of *need* and *material sought;* however, the principle of balancing the competing interests remains the same.

fessors had refused to reveal in discovery how they voted on Gray's application for promotion. The *Gray* court recognized that confidentiality of the faculty vote "is of value to society," and carefully balancing the competing interests, found "the scales tip decidedly toward protecting the confidentiality of the peer-review system." *Gray*, slip opinion, at 16. Unfortunately, the Fifth Circuit did not have the benefit of *Gray* in deciding *Dinnan*. The obvious conflict and confusion caused by *Gray* and *Dinnan* resulted in the Ninth Circuit amending *Lynn v. Regents of the University of California*, *supra*, on December 18, 1981 to replace a citation to *Dinnan* with an enigmatic note to compare *Dinnan* and *Gray*.

It is apparent that the case at bar is in conflict with other federal decisions and is likely to cause even more confusion in the future. Therefore this Court should resolve the issue presented and establish judicial standards to guide lower courts in the resolution of this important and frequently recurring problem.

3. The distortion by the Court of Appeals of the issues involved in this case has implications to the academic community which go far beyond promotion-tenure committees. Faculty members are frequently called upon to make professional, academic judgments in matters of university governance. For instance, university faculty must rank graduate students according to academic prowess for the purpose of receiving stipends. The Fifth Circuit's opinion has the potential to open for scrutiny numerous confidential and private academic functions, to the evident detriment of academic freedom.

It is submitted, therefore, that the potentially damaging impact of this case upon academic activities other than promotion-tenure decisions justifies review of the case by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDICES

Appendix A Opinion, *In Re Dinnan*, 661 F.2d 426 (5th Cir. 1981).

Appendix B Opinion, *In Re Dinnan*, 625 F.2d 1146 (5th Cir. 1980).

Appendix C Denial of Petitioner's Suggestion For Rehearing En Banc, dated December 17, 1981.

Appendix D Order of District Court dated May 6, 1980 Compelling Discovery.

Appendix E Order of District Court dated June 3, 1980, holding Petitioner in contempt of court.

Appendix F Opinion, *Gray v. Board of Education*, 50 U.S.L.W. 2307 (S.D.N.Y. 1981).

APPENDIX A

In re James A. DINNAN, Appellant.

Maija S. BLAUBERGS,
Plaintiff-Appellee,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
et al., Defendants,

James A. Dinnan, Movant-Appellant.

Nos. 80-7432, 80-7441.

United States Court of Appeals,
Fifth Circuit.*
Unit B

Nov. 16, 1981.

Appeals from the United States District Court for the Middle District of Georgia.

Before SIMPSON, RONEY and THOMAS A. CLARK, Circuit Judges.

THOMAS A. CLARK, Circuit Judge:

The instant action arises from a suit brought by Maija Blaubergs against the Board of Regents of the University of Georgia and others. This suit alleges, *inter alia*, that she was unlawfully denied promotion to the rank of associate professor and that her employment had been unconstitutionally terminated. During the course of discovery, on April 18, 1980, the deposition of Professor James A. Dinnan was taken. This deposition related to his service on the College of Education Promotion Review

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

Committee that considered Blaubergs' application for promotion during the 1979-80 academic year. When asked how he voted on the application, Dinnan refused to answer.

The appellee then filed a motion for an order compelling discovery. After a hearing on the issue, the court ordered the appellant to testify. The deposition continued on May 23, 1980, and Dinnan reiterated his refusal to answer any question regarding his vote. The appellee thereupon filed a motion for the imposition of contempt sanctions against Dinnan. On June 2, 1980, the court held a hearing to consider the appellee's motion, and informed Dinnan that it intended to proceed against him at a hearing the next day.

The court heard the appellant's arguments on June 3, and thereafter held him in contempt. He was ordered to pay a fine of one hundred dollars per day for thirty days and if he persisted in his defiance of the court order he was to report for a ninety-day term of imprisonment. However, the order was framed to allow an immediate cessation of the fine and imprisonment if Dinnan came forward with the desired information. A motion to stay sentence was denied, and a notice of appeal filed. Immediately thereafter, Dinnan filed a motion under 28 U.S.C. § 2255 alleging an illegal sentence and a denial of due process. The motion was denied on the basis that this was a civil, not a criminal, proceeding and that there was adequate notice. Notices of appeal from the court's order compelling discovery and from the court order finding him in contempt have been consolidated in the instant action.

[1] The appellant argues that the instant case is one of "academic freedom." We, however, are unable to accept this characterization and, indeed, believe that any such view of the present case requires a gross distortion of its facts.

This case simply involves the law of evidence; there are no issues of constitutional dimension raised. The appellant is claiming a privilege, *i. e.*, a right to refrain from testifying, that heretofore has not been considered or recognized by any court. The issue before this court then is whether the privilege claimed by the appellant should be endorsed by this circuit.

We hold that no privilege exists that would enable Professor Dinnan to withhold information regarding his vote on the promotion of the appellee. This result is required on the basis of fundamental principles of law and sound public policy.

The appellant basically contends that he has the privilege not to testify in the proceedings below because he is sheltered by an "academic freedom privilege." Before discussing this argument, it is necessary to review briefly the philosophic principles that gave rise to the privileges that presently exist. As a preliminary consideration, however, it must be kept in mind that while the law consists of a framework of legislative actions, judicial precedent, and moral considerations, virtually every judicial inquiry begins with the goal of developing the facts. The basis of justice is the truth and our system frowns upon impediments to ascertaining that truth. This need to develop the facts if the judicial system is to function is summarized by Wigmore:

> From the point of view of society's *right* to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole—from justice as an institution and from law and order as indispensable elements of civilized life. . . . The whole life of the community, the regularity and continuity of its relations, depends upon the coming of the witness. Whether the achievements of the past shall be preserved, the energy of the present

> kept alive, and the ambitions of the future realized depends upon whether the daily business of regulating rights and redressing wrongs shall continue without a moment's abatement, or shall suffer a fatal cessation. The business of the particular cause is petty and personal, but the results that hang upon it are universal. The vital process of justice must continue unceasingly. A single cessation typifies the prostration of society. A series would involve its dissolution. The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in the present cause, but to the community at large and forever.[1]

A privilege is the right not to give testimony. The most fundamental privilege is constitutionally protected, the privilege against self-incrimination. That privilege came about as a reaction to the practice of extracting confessions by means of the rack and whip, by subjecting the prisoner's family to harm, and by a variety of other means. Our system, while dedicated to a discovery of the truth, subjugates that dedication to the principle that a person shall not be compelled to testify against himself.[2]

Our common law has established other privileges. A businessman, a taxpayer, or an accused may discuss freely with an attorney of his choice the problem that may subject him to liability for a debt, taxes, or a crime. Conversations between a person and his attorney are protected by the privilege. The basis for this privilege is a societal judgment that one should have the right to seek legal advice free from the fear that conversations with his attorney will be used against him. Without that privilege, a

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[1] 8 Wigmore on Evidence § 2192 (McNaughton ed. 1961).

[2] *See* 8 Wigmore on Evidence § 2250 (McNaughton ed. 1961); C. McCormick, Handbook on the Law of Evidence §§ 114-18 (2d ed. 1972).

client would not be motivated to tell the attorney the whole truth and, in turn, the attorney would be unable to give the appropriate advice. Our system deems this relationship worth protecting.[3]

The law also has extended the privilege not to testify to a priest or other religious leader who has heard the confession of a penitent. This privilege has its basis in the societal judgment that a person should be permitted to seek his peace with God, as well as the idea that to compel such testimony would violate church discipline and thereby infringe upon religious liberty.[4] The law has accorded a privilege to spouses on a theory that confidences extended by one spouse to the other should be privileged from judicial inquiry so that marital harmony will not be destroyed.[5] Likewise, a physician-patient privilege exists in order to insure that one is not penalized for seeking medical help.[6]

There are other types of privileges that might be classified as qualified privileges. One example is the "work product" privilege.[7] Usually, a party to litigation does

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[3] *See* C. McCormick, Handbook on the Law of Evidence §§ 87-88 (2d ed. 1972); J. Weinstein & M. Berger, 2 Weinstein's Evidence § 503[02] (1980); 8 Wigmore on Evidence § 2290 (McNaughton ed. 1961).

[4] *See* J. Weinstein & M. Berger, 2 Weinstein's Evidence § 506[02] (1980); C. McCormick, Handbook on the Law of Evidence § 77 (2d ed. 1972); 8 Wigmore on Evidence § 2394 (McNaughton ed. 1961).

[5] *See* 8 Wigmore on Evidence § 2218 (McNaughton ed. 1961); J. Weinstein & M. Berger, Weinstein's Evidence § 505[02] (1980); C. McCormick, Handbook on the Law of Evidence § 78 (2d ed. 1972).

[6] *See* 8 Wigmore on Evidence § 2380 (McNaughton ed. 1961); C. McCormick, Handbook on the Law of Evidence § 98 (2d ed. 1972); J. Weinstein & M. Berger, 2 Weinstein's Evidence § 504 (1980).

[7] *See Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 9 L.Ed. 451 (1947). *See also* Fed.R.Civ.P. 26.

not have to discuss facts developed by him or his lawyer regarding the case if such facts can be equally developed by the other side.[8] This can be likened to a patent privilege where one party has done the work to develop a product and others are not permitted to replicate it. However, in the case of the work product privilege, if information secured by one party or his attorney is not available for some reason to the other party, our courts require that such information be divulged on the theory that the truth must be discovered unless there is some overwhelming philosophic basis for denying access to that information.[9] A privilege of this sort requires a balancing of the interests involved in every application of it. However, it should be remembered that most of these privileges have exceptions.

Privileges are based upon the idea that certain societal values are more important than the search for truth. There is no question that the doctrine of privilege or immunity from testifying has been narrowly proscribed. A leading commentator on the law of evidence has remarked:

> There must be good reason, plainly shown, for their [privileges] existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget their exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to extend them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The in-

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[8] *See* C. McCormick, Handbook on the Law of Evidence § 96 (2d ed. 1972); C. Wright & A. Miller, Federal Practice and Procedure § 2021 (1970).

[9] *See* C. Wright & A. Miller, Federal Practice and Procedure § 2025 (1970).

> vestigation of truth and enforcement of testimonial duty demand the restriction, not the expansion of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.[10]

Recently, reasoning along these lines has carried the day and judge-made privileges have fallen into disfavor.[11] In recent times, commentators have tended to view privileges as hindering litigation and have generally advocated a narrowing of the field.[12] While a number of new privileges have been established recently, they generally have been statutorily created.[13]

The appellant correctly observes that the Federal Rules of Evidence allow the judicial creation of new privileges. Indeed, in the absence of a constitutional or statutory mandate, this court is charged to examine a claimed new privilege under the "principles of the common law, . . . in light of reason and experience."[14] Congress in enacting Federal Rule of Evidence 501 "manifested an affirmative intention not to freeze the law of privilege."[15] Instead it intended to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis."[16]

In line with this, the Supreme Court has recently stated, "privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence'

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[10] 8 Wigmore on Evidence § 2192 (McNaughton ed. 1961).

[11] C. McCormick, Handbook on the Law of Evidence § 77 (2d ed. 1972).

[12] *Id.*

[13] *Id.*

[14] Fed.R.Evid. 501.

[15] *Trammel v. United States*, 445 U.S. 40, 48, 100 S.Ct. 906, 911, 63 L.Ed.2d 186 (1980).

[16] *Id.*

[citations omitted]." As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[17] Explicitly adressing the issue of the establishment of new privileges, the Supreme Court has stated that "exceptions to the demand for every man's evidence *are not lightly created* nor expansively construed, for they are in derogation of the search for truth."[18] Thus, where there is no compelling justification for a new privilege, the vital truth-seeking function of our justice system must carry the day.

Bearing in mind that there has been a notable hostility on the part of the judiciary to recognizing new privileges [19] and that the public policy served by a new privilege must transcend the normally dominant truth-seeking considerations, we turn to the privilege claim brought forth in the instant case. The appellant argues that the new privilege is necessary to protect two important societal interests, "academic freedom" and the "secret ballot." We find neither argument to be even slightly persuasive; we will examine the former contention first.

[2] The appellant urges us to establish an evidentiary privilege in the instant case in order that "academic freedom" might be protected. The appellant construes the term "academic freedom" to include more than it does. Unquestionably, academic freedom is one of the para-

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[17] *Trammel v. United States*, 445 U.S. at 49, 100 S.Ct. at 912 (1980).

[18] *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974) (emphasis added).

[19] *See, e. g.*, C. McCormick, Handbook on the Law of Evidence § 77 (2d ed. 1972).

mount values of this Republic. However, if the concept is expanded too far it can cause other important societal goals (such as the elimination of discrimination in employment decisions) to be frustrated. Indeed, if the concept were extended as far as the appellant argues, it would rapidly become a double-edged sword threatening the very core of values that it now protects.

Academic freedom is "of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967). Time after time the Supreme Court has upheld academic freedom in the face of government pressure. *See, e. g., Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957); *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952). However, in all those cases there was an *attempt to suppress ideas* by the government. *Ideas may be suppressed just as effectively by denying tenure as by prohibiting the teaching of certain courses.* Quite bluntly, this Court feels that the government should stay out of academic affairs. However, these issues are not presented in the instant case. Here a *private* plaintiff is attempting to enforce her constitutional and statutory rights in an employment situation. Therefore, the reasoning behind the cited cases simply does not apply here.

Passages are presented to the Court from *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), and *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980), to support the appellant's contentions. Both these quotations carry the seeds of destruction of the appellant's argument within

them. From *Bakke*, the appellant quotes:

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that comprise academic freedom:
>
> > "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential feedoms" of a university—to determine for itself *on academic grounds* who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

438 U.S. at 312, 98 S.Ct. at 2759. Here, however, we have an allegation that the University of Georgia decided a tenure application *on other than academic grounds*, which clearly takes it outside of what the *Bakke* Court envisioned to be the limits of academic freedom. Indeed, the excerpt from *Kunda v. Muhlenberg College* that the appellant urges upon us as persuasive authority is even more damning to his cause:

> It is beyond cavil that generally faculty employment decisions comprehend discretionary academic determinations which do entail review of the intellectual work product of the candidate. That decision is most effectively made within the university and although there may be tension between the faculty and the administration on their relative roles and responsibilities, it is generally acknowledged that the faculty has at least the initial, if not the primary, responsibility for judging candidates. "The peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution." *Johnson v. University of Pittsburgh*, 435 F.Supp. 1328, 1346 (W.D.Pa.1977).

> Wherever the responsibility lies within the institution, it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, *and unless they can be shown to have been used as a mechanism to obscure discrimination*, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.

621 F.2d at 547-48 (emphasis added). Here the allegation is that the appellee *was discriminated against*, precisely the situation that the Third Circuit envisioned in *Kunda v. Muhlenberg College* in which courts should intervene. Thus, the authority relied upon by the appellant does not, upon close scrutiny, support his position.

The appellant is frustrating the appellee's attempt to vindicate an alleged infringement of her statutory and constitutional rights. Though the case is one involving an alleged case of sex discrimination, admittedly a cause of action not especially favored by some groups at the present time, its implications are staggering. Using the appellant's logic, if a tenure committee attempted to stop the promotion of all faculty members who were not pro-abortionists, a right-to-life music professor's attempt at discovery could be barred by the concept of "academic freedom." Likewise, a physicist's application might be sabotaged because he opposed the cession of the Panama Canal where such a position was not favored by the committee. In all these cases, "academic freedom" would shield the tenure committee from having to reveal its votes, even though the decision had nothing to do with

any academic grounds. In every one of these scenarios, the rights of the applicant would be infringed upon, but "academic freedom" would serve to obstruct the vindication of these rights. This possibility is a much greater threat to our liberty and academic freedom than the compulsion of discovery in the instant case.

Though we recognize the importance of academic freedom, we must also recognize its limits. The public policy of the United States prohibits discrimination; Professor Dinnan and the University of Georgia are not above that policy. To rule otherwise would mean that the concept of academic freedom would give any institution of higher learning a *carte Blanche* to practice discrimination of all types.

The appellant further claims that there is a common law privilege designed to protect the secret ballot, and that since Dinnan's vote was made by secret ballot it is protected. This claim is unconvincing. The only cases which the appellant cites [20] deal either with the political process or with labor union elections (which are sufficiently close to the political process to justify their inclusion within that category).[21] This alone effectively distinguishes those cases from that before the court at the present time. In the instant case we simply have an employment decision, which by no stretch of the imagination deserves the protection that is accorded to individual participation in the political process.

[3] Further, the reason ballots are kept secret is to encourage individuals to vote in political and politically-

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[20] *See, e. g., Johnston v. Charleston*, 1 S.C.L. (1 Bay) 441 (1795); *Royal Lumber Company*, 118 N.L.R.B. 1015 (1957).

[21] *See* J. Weinstein & M. Berger, 2 Weinstein's Evidence § 507[03] (1980).

related elections. Society has a strong interest in encouraging all individuals, even the most timid, to vote. If an individual's ballot was not privileged, the policy of the secret ballot could be frustrated easily.[22] Further, a victorious politican, labor union, or employer would be able to commit reprisals against the individual.[23] In the instant case, society has no strong interest in encouraging timid faculty members to serve on tenure committees. Additionally, this court is unconvinced that an applicant who is denied tenure can retaliate against tenured faculty members. Therefore, the reasoning that protects political and labor election ballots from discovery is inapplicable here. Thus, we find absolutely no merit in the claim of a secret ballot privilege.

The appellant essentially argues that an institution of higher learning has the untrammelled right to grant tenure to whomever it pleases. He maintains that an evidentiary privilege is necessary to protect his right. Dinnan contends that the university decision-makers will be inhibited in making tenure decisions if there is a possibility that committee members will be required to reveal their votes. We do not believe that this justifies the creation of a new privilege. We fail to see how, if a tenure committee is acting in good faith, our decision today will adversely affect its decision-making process. Indeed, this opinion should work to reinforce responsible decision-

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[22] *See* 8 Wigmore on Evidence § 2214 (McNaughton ed. 1961); J. Weinstein & M. Berger, 2 Weinstein's Evidence § 507[02] (1980).

[23] *See, e. g.*, "[C]ompelling them to declare for whom they gave their votes, . . . was a kind of inquisitorial power unknown to the principles of our government and constitution, and might be highly injurious to the suffrages of a free people as well as tending to create cabals and disturbances between contending parties in popular elections." 1 S.C.L. (1 Bay) 441, 442 (S.C.1795).

making in tenure questions as it sends out a clear signal to would-be wrongdoers that they may not hide behind "academic freedom" to avoid responsibility for their actions.

No one compelled Professor Dinnan to take part in the tenure decision process. Persons occupying positions of responsibility, like Dinnan, often must make difficult decisions. The consequence of such responsibility is that occasionally the decision-maker will be called upon to explain his actions. In such a case, he must have the courage to stand up and publicly account for his decision. If that means that a few weak-willed individuals will be deterred f.om serving in positions of public trust, so be it; society is better off without their services. If the decision-maker has acted for legitimate reasons, he has nothing to fear. We find nothing heroic or noble about the appellant's position; we see only an attempt to avoid responsibility for his actions. If the appellant was unwilling to accept responsibility for his actions, he should never have taken part in the tenure decision-making process. However, once he accepted such a role of public trust, he subjected himself to explaining to the public and any affected individual his decisions and the reasons behind them.

Since neither academic freedom nor any valid secret ballot consideration is raised in the instant case, the truth-seeking function of our system of justice must prevail over the novel privilege claimed by the appellant. Thus, since the matters sought in discovery were relevant to the claim, the district court's order compelling discovery and the contempt order against Professor Dinnan were proper.

The appellant also raises a number of issues arising out of the trial judge's characterizati of the contempt and

whether adequate notice was given for the appellant to present an adequate defense below. These issues were already disposed of by another panel of this court, *In re Dinnan*, 625 F.2d 1146 (5th Cir. 1980). The court there decided that the contempt was civil, the sentence was constitutional, and that Dinnan was given adequate notice to prepare his defense. Those issues cannot be re-litigated in this appeal.

Accordingly, the district court's orders compelling discovery and holding the appellant in contempt are AFFIRMED.

APPENDIX B

In re James A. DINNAN, Appellant.

Maija S. BLAUBERGS,
Plaintiff-Appellee,

v.

BOARD OF REGENTS OF the UNIVERSITY SYSTEM OF GEORGIA
et al., Defendants,

James A. Dinnan, Movant-Appellant.

Nos. 80-7432, 80-7441.

United States Court of Appeals,
Fifth Circuit.
Unit B
Aug. 28, 1980.

Appeals from the United States District Court for the Middle District of Georgia.

Before RONEY, HILL and FRANK M. JOHNSON, Jr., Circuit Judges.

BY THE COURT:

James A. Dinnan is one of nine University of Georgia professors who served on a mid-level committee which recommended that Maija Blaubergs not be advanced to Associate Professor. When Blaubergs was not promoted, she brought federal suit against the Board of Regents claiming sex discrimination. *Blaubergs v. Board of Regents*, No. 79-42-Ath. (M.D.Ga., filed May 24, 1979). Blaubergs deposed several members of the committee, including Dinnan. Dinnan refused to reveal his individual vote. Asserting this inquiry was critical to her allegations of sex discrimination, plaintiff Blaubergs sought an order compelling an answer. Such an order was entered only after a hearing at which Dinnan was represented by counsel. Upon Dinnan's continued refusal to testify, plaintiff

moved for a contempt citation.

At a hearing on June 2, 1980, the district court gave notice that it would proceed the next day under rule 42 of the Federal Rules of Criminal Procedure. On June 3 the court denied Dinnan's motion for a continuance and, after taking evidence and hearing arguments, ordered the following:

> So the Court finds the professor, Dr. James A. Dinnan, to be in criminal contempt pursuant to Rule 42 of the Federal Rules of Criminal Procedure and imposes the following punishment upon him. He shall pay to the Clerk of this Court $100 this afternoon and $100 every afternoon on or before five o'clock for the next thirty days, and during that period of time if he continues to be in contempt he shall then report to the United States Marshal of this Court and serve ninety days in the United States Penitentiary, and during any of those days he may purge himself of contempt if he wishes to do so and the Court's punishment will cease. Failing his purging himself he will pay the total fine and will serve the total sentence.

Dinnan filed a notice of appeal and moved to stay the judgment under Fed.R.App.P. 9. His motion was denied by this Court through another panel and by Mr. Justice Powell as Circuit Justice.

Dinnan paid the $3,000 fine and on July 3, 1980, presented himself to the United States Marshal and was taken into custody, where he remains at this time. He also petitioned the district court for a writ of habeas corpus under 28 U.S.C.A. § 2255, arguing that he received inadequate notice of criminal contempt proceedings under Fed.R.Crim.P. 42(b), and that the imposition of both a fine and imprisonment was illegal punishment for criminal contempt. Since the fine had been paid, he contended he was entitled to immediate release. *In re Bradley*, 318 U.S.

50, 63 S.Ct. 470, 87 L.Ed. 608 (1943); *United States v. Barnette*, 546 F.2d 187 (5th Cir.), *cert. denied*, 434 U.S. 822, 98 S.Ct. 65, 54 L.Ed.2d 79 (1977).

Interpreting its order as civil rather than criminal, the court denied the petition, stating:

> Regardless of the court's statement that the contempt violation was criminal, the court in retrospect views the contempt as civil. The sanctions are and were intended only as a remedial measure to coerce the defendant to do what he has refused to do.

No notice of appeal has been filed from the denial of the habeas corpus petition.

Although his motion recites that "Professor Dinnan has always maintained that this matter, arguendo, is civil, not criminal," Dinnan seeks alternative relief, depending upon whether the order is a criminal contempt order or a civil contempt order. If criminal, he seeks a writ of habeas corpus or mandamus ordering his release from unlawful custody. If civil, he seeks an expedited appeal under 28 U.S.C.A. § 1826. He specifically does not seek to be released under the 30-day requirement of § 1826 because he does not want to risk being returned to jail if he loses his appeal. This Court does not now have before it the merits of the appeal from the underlying contempt order, only the motions for alternative collateral relief.

[1] Our first task is to determine whether the contempt judgment is civil or criminal. Here, as in *Smith v. Sullivan*, 611 F.2d 1050, 1052-53 (5th Cir. 1980), "there was some confusion as to whether the contempt proceeding was civil or criminal." Our cases suggest that when it is impossible to determine which type of contempt is involved, the judgment cannot stand. *In re Monroe*, 532 F.2d 424 (5th Cir. 1976); *Skinner v. White*, 505 F.2d 685 (5th Cir.

1974); *Clark v. Boynton*, 362 F.2d 992 (5th Cir. 1966). This case, however, does not come within that rule, for it is easy for this Court to determine under well established law that the judgment was a civil contempt order.

[2, 3] Although the district court initially characterized the proceeding as criminal, and followed the more stringent notice and procedural requirements of criminal contempt, neither that procedure nor the district court's characterization controls the determination. *Shillitani v. United States*, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); *Lewis v. S.S. Baune*, 534 F2.d 1115, 1119 (5th Cir. 1976); *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968). The conclusive, most important factor in distinguishing civil and criminal contempt is the purpose of the contempt judgment. *Smith v. Sullivan*, 611 F.2d at 1053; *In re Grand Jury Investigation*, 610 F.2d 202 (5th Cir. 1980). If its purpose is to coerce the contemnor into compliance with the court's order or to compensate the complainant for losses sustained, then the proceeding is civil. On the other hand, if its purpose is to punish or to vindicate the authority of the court, then the proceeding is criminal. *United States v. United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); *In re Stewart*, 571 F.2d 958 (5th Cir. 1978).

Here the district court's judgment was made wholly conditional upon Dinnan's continued refusal to testity. Its purpose was coercive, not punitive. When contemnors "carry the keys of their prison in their own pickets," *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902), the contempt proceedings are almost universally found to be civil. *Shillitani v. United States*, 384 U.S. at 368, 86 S.Ct. at 1534; *United States v. Bizzo*, 539 F.2d 458, 465 (5th Cir. 1976). No part of the penalty was absolute; it was only imposed daily as Dinnan refused to give the ordered testimony.

[4, 5] Contrary to Dinnan's argument, the fact that the $3,000 fine was paid to the clerk of the court, not as damages to the complainant, does not indicate that the contempt is criminal. The Supreme Court specifically stated in *United States v. United Mine Workers*, 330 U.S. at 303-04, 67 S.Ct. at 781, that fines in civil contempt proceedings may be levied for either of two purposes: (1) to compensate the complainant, in which case the amount must be limited to actual damages shown, or (2) to compel the contemnor to comply with the court's order, in which case the amount must be reasonably designed to force compliance, without being punitive. A coercive, nonpunitive fine payable to the clerk of the court is an appropriate tool in civil contempt cases. *See Winner Corp. v. H.A. Caesar & Co.*, 511 F.2d 1013, 1015 (6th Cir. 1975); *IBM v. United States*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 380 F.2d 570 (D.C.Cir.), *cert. denied*, 389 U.S. 970, 88 S.Ct. 463, 19 L.Ed.2d 461 (1967); *Woods v. O'Brien*, 78 F.Supp. 221 (D.Mass. 1948). *See also* 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 110.13[4] (1980). Dinnan does not contend the $100 a day was excessive for this purpose.

[6] The maximum imprisonment was fixed at 90 days. A fixed term of imprisonment, with the proviso that the contemnor will be released if he complies with the court order, is a proper penalty for civil contempt and the imposition of such a penalty does not make the proceeding criminal. In *Shillitani v. United States*, 384 U.S. at 364, 86 S.Ct. at 1531, the petitioners had been sentenced to two years imprisonment but with automatic release if they gave the ordered testimony. The Supreme Court held the contempt proceedings to be civil.

[7, 8] Imprisonment for civil contempt may not continue, however, beyond the time when the ordered testimony is useful. *Shillitani v. United States*, 384 U.S. at 371, 86 S.Ct. at 1536; *Maggio v. Zeitz*, 333 U.S. 56, 76, 68 S.Ct. 401, 92 L.Ed 476 (1948). Dinnan cannot be held if plaintiff's underlying action has been terminated. 28 U.S.C.A. § 1826(a)(1). Counsel have not indicated that this is likely to occur prior to the conclusion of 90 days. This Court has verified with the district court that the action has not been terminated. The fact that the time certain set for imprisonment is less than the indefinite time authorized by statute would not convert the order from civil to criminal.

[9] Unlike criminal contempt where imprisonment and a fine cannot be combined, *In re Bradley*, 318 U.S. at 50, 63 S.Ct. at 470, a finding of civil contempt permits the coercive combination of both fine and imprisonment.

Thus, it clearly appears that under the language of the order and the controlling authorities, Dinnan was subjected to a civil contempt order.

[10] With that determination, the proper disposition of these motions is dictated by well settled law. Because the proceedings were civil in nature, Dinnan in not entitled to be released from custody so long as he is in violation of a valid underlying order to testify. His motion does not argue otherwise. He may, however, claim the protections of 28 U.S.C.A. § 1826, including the right to an expedited appeal in which he attacks the underlying order. Although 28 U.S.C.A. § 1826(b) states that such appeals shall be heard within 30 days, this Court cannot order release from custody under that subsection for three reasons. First, Dinnan has specifically requested that he not be released on that ground. Second, the law in this Circuit prevents

release of a contemnor just because the appeal is not decided within 30 days, but instead requires an extension of time so that the appeal can be handled in an orderly expedited fashion. *See In re Grand Jury Proceedings*, 605 F.2d 750, 751-52 & n.1 (5th Cir. 1979); *In re Tierney*, 465 F.2d 806, 809 (5th Cir. 1972), *cert. denied*, 410 U.S. 914, 93 S.Ct. 959, 35 L.Ed.2d 276 (1973). Third, this present motion is Dinnan's first request for an expedited appeal. Indeed, no argument has yet been made to this Court as to why Dinnan should not have answered the question posed, and Dinnan has yet to file a brief addressing the merits of his argument against the validity of the underlying discovery order. Fairness to an appellant requires this Court to decide the appeal only after proper briefing.

IT IS ORDERED that Dinnan's petition for a writ of habeas corpus and alternatively for writ of mandamus is DENIED. Dinnan's motion for an expedited appeal is GRANTED, with the clerk to set an expedited brifing schedule. The time within which this appeal must be decided under § 1826 is extended until 10 days after the appellee's brief is due or earlier filed, unless the time is further extended by the screening panel, or a judge thereof.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT*

UNIT B

NO. 80-7432

IN RE: JAMES A. DINNAN,

Appellant.

* * * * * *

NO. 80-7441

MAIJA S. BLAUBERGS,

Plaintiff-Appellee,

versus

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al.,

Defendants,

JAMES A. DINNAN,

Movant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 16, 1981, 5 Cir., 198__, ____ F.2d ____.)

(Dec. 17, 1981)

BEFORE SIMPSON, RONEY and CLARK, Circuit Judges.

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*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452—October 14, 1980.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK

UNITED STATES CIRCUIT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA ATHENS DIVISION

MAIJA S. BLAUBERGS VS. BOARD OF REGENTS of the University System of Georgia, et al.	C. A. NO. 79-42-Ath.

ORDER

What we are here about is protection of a constitutional right, but I fear that you gentlemen are focusing on the wrong constitutional right. The constitutional right that we are here about is the constitutional right of the faculty member who is being considered pursuant to procedures adopted by the University for tenure.

Normally we go and you go by whatever procedures are adopted by the Board of Regents and in turn adopted by the University administration not inconsistent with whatever the Regents say the procedure shall be. If the Regents and the University say that the vote of the individual faculty member is documented and reported, that's their business. If they say it's not documented and not reported that's their business. But you gentlemen who are part of the process are not the ones who are to decide whether you are accountable for what you do or not. You work for the University just like everybody else does and you are supposed to abide by whatever procedures they say you are to abide by.

Now this Court doesn't get involved until somebody who is under consideration for tenure comes to Court and alleges what appears to be a possible claim that somebody in the promotion process has used a constitutionally

impermissible reason for whatever they did. It then becomes this Court's duty and responsibility and Congress has said, and the jurisdiction of this Court to inquire into that matter. The beginning of the process, gentlemen, is to determine what the facts are. That's what this Court has to do. This Court is not permitted to assume that you gentlemen, for constitutionally impermissible reasons, did anything. You are accountable for what you do. When you accept the privileges of tenure you accept with it the responsibilities of tenure, one of which is to fairly consider those who haven't been given tenure and work in your department pursuant to the procedures adopted by the University. This Court can't determine whether or not you did that unless you explain to the Court when it's necessary to do so what you individually did and why you did it. And I realize that's distasteful. Put yourselves in the shoes of we judges. It would be a lot easier for one of us, and no controversy would attach, if all we had to do as a judge is say, we find for the plaintiff for "X" dollars. But we can't do that. We have to tell why we do what we do. And when we accept a judgeship we accept that responsibility. We know that some people are going to like what we do and some dislike it. Our only consolation is we've got to have backbone enough to call it just like we see it. And we are protected. You are protected. You've got tenure which gentlemen is the closest kin to being appointed for lifetime which was given to we judges to protect us and to give us the right to go with the responsibility that we have.

I know of nothing that shields you gentlemen from being accountable when there is what appears to be a genuine question concerning the basis for what you do. Other than that you don't have to show; but there is such a case in this court and it's the Court's duty to

cause an inquiry to be made and to cause you gentlemen to fully answer as to how you acted on this particular faculty member's application for promotion or tenure and why you did it. So I have no choice other than to tell you that you must do that.

The only question is to arrange with them when to supplement their depositions.

Is there anything else, gentlemen?

MR. MARSHALL: The question of expenses and reasonable attorney's fees.

THE COURT: As far as I know, this is a novel question. It's the first time I have had it in this Court. I don't think I would cause anybody to pay on either side under these circumstances. Now that doesn't mean that the next person who comes to court with the question will receive the same consideration.

SO ORDERED this 6th day of May, 1980.

/s/ WILBUR D. OWENS, JR.
Wilbur D. Owens, Jr.
United States Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA ATHENS DIVISION

MAIJA S. BLAUBERGS VS. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al. VS. IN RE: JAMES A. DINNAN	Criminal No. 80-4-ATN.

ORDER

I think it's the Court's responsibility, an Order having already been duly entered and commanding him to so testify to now enforce it. This Court doesn't look upon it as a dispute between this professor and the parties to the case. It's a dispute between this professor and the authority of this United States Court which is his court just like it's the court of every citizen of these United States. He has an interest in it. We have an interest in it. And this Court is no stronger than the respect accorded its orders by this man just like all citizens. And the day Judges cease to insist that orders be obeyed the court system will collapse and he and everybody else will no longer have a court system in this great free country that we live in.

Now the Court gave verbal notice under Rule 42 of the Rules of Criminal Procedure that the Court would take up as a matter of criminal contempt the failure of the professor to abide by the Court's Order. Under the Court's procedure in the Court's best judgment he has had more than adequate notice. He has had adequate opportunity

to respond both factually and legally. And I think it is the Court's terrible duty now to do something to enforce its own Order.

The case law says that the Judge is supposed to exercise a sound discretion. That's very difficult to do in this type matter. The Court's object is not to be punitive to the professor. The object is to cause him to obey the Court's Order.

But unfortunately the only means that the Court has of causing obedience is to impose some type of punitive judgment upon the professor. We can't take him out and whip him like we do our children. And that may sound trite but I don't really think it is. I think when we adults forget that we have an obligation to obey that sometimes it might be appropriate to use some punitive measures on us like we so feely use on our children. I can't do that though. I can only come up and use the authority given me under the Constitution and laws.

So the Court finds that the professor, Dr. James Dinnan, to be in criminal contempt pursuant to Rule 42 of the Federal Rules of Criminal Procedure and imposes the following punishment upon him. He shall pay to the Clerk of this Court $100 this afternoon and $100 every afternoon on or before five o'clock for the next thirty days, and during that period of time if he continues to be in contempt He shall then report to the United States Marshal of this Court and serve ninety days in the United States Penitentiary, and during any of those days he may purge himself of contempt if he wishes to do so and the Court's punishment will cease. Failing him purging himself he will pay the total fine and will serve the total sentence. On any day that he fails by five o'clock to have furnished $100 in United States currency to this Court

the Marshal of this Court will be authorized to instanter pick him up without further notice.

And that is the judgment of the Court.

MR. SCOTT: Would Your Honor grant a bond in this matter?

THE COURT: Yes sir. The Court will grant a $10,000 bond with a surety.

MR. SCOTT: And in the event Dr. Dinnan decides to pay the $100 per day how can he do that when the Court is not here?

THE COURT: Mr. Scott, he may hand you the $100 and you may telephone the Clerk and tell him that you are possessed of the $100 and are forwarding and the Court will be pleased to accept your representation as a member of the Bar of the Court that you have the money in hand and are responsible for it.

MR. SCOTT: Could we send it by cashier's check rather than cash money?

THE COURT: It does not matter, as long as you are accountable to the Court.

MR. SCOTT: But Your Honor said United States currency.

THE COURT: Yes sir, but I said you may report to the Court since we are not here everyday, that you hold his money and are forwarding it to the Court.

MR. SCOTT: What about on Saturdays and Sundays when the Clerk is not open?

THE COURT: As long as he gets the $100 to you that will be fine. He can give it to you on Friday for the weekend.

MR. SCOTT: A cashier's check from me to the Court would be acceptable?

THE COURT: Would be most acceptable. This will be typed up and I will sign it and you may file a notice of appeal. Bear in mind now that there is no stay that is issued on this. Just because you appeal does not stay.

MR. SCOTT: But if we make a $50,000 bond—

THE COURT: Yes sir, with good surety. And that stay will last, Mr. Scott, only until the date on which he is to report to begin serving his sentence. That will give you adequate time to try to convince the Fifth Circuit that the Court's judgment is wrong.

MR. LARKINS: As a general motion to stay you will not entertain that?

THE COURT: I will entertain it but I will not grant it.

MR. LARKINS: May we orally make that motion now?

THE COURT: Yes sir. And let the record indicate that it's not granted. So that will put you in position as I told you before to seek a stay from the Fifth Circuit if you wish to.

SO ORDERED this 3rd day of June, 1980.

/s/ WILBUR D. OWENS, JR.
Wilbur D. Owens, Jr.
United States Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. SIMPSON GRAY,

Plaintiff,

- v -

BOARD OF HIGHER EDUCATION, CITY OF NEW YORK, DR. ROBERT KIBEE, as Chancellor, Bd. of Higher Education, City of New York; CITY UNIVERSITY OF NEW YORK, FIORELLO H. LA GUARDIA COMM. COLLEGE, DR. JOSEPH SHENKER, as President, LaGuardia Comm. College; DR. MARTIN MOED, as Vice President and Dean of Faculty and member of College P & B Committee; DR. FLORA MANCUSO, as Associate Dean of Faculty; PROF. DONALD DAVIDSON, as member, Collegewide P & B Committee and PSC representative; DR. IRA EPSTEIN, DR. GEORGE HAMADA, DR. JEFFREY KLEINBERG, DR. HARRY HEINEMANN, DR. ROBERTA MATTHEWS, as member of the P & B; RONALD C. MILLER, as Chairman, Accounting / Managerial Studies Dept.; DR. JOEL MILLONZI and DR. ROBERT O'PRAY, as member of P & B, MARY E. RYAN, as Director of Personnel and Affir. Action Office and Grievance Designee; PROF. FRANK TIMONI; DR. JOHN MUELIN, as former member of Dept.; DR. ROSE PALMER, in former capacity as Chairperson, Business Division, member of P & B, all individually and in their respective capacities, jointly and severally, and THE PROFESSIONAL STAFF CONGRESS,

Defendants.

79 Civ. 0062 (LWP)

APPEARANCES:

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LAWRENCE W. PIERCE, D.J.

MEMORANDUM OPINION AND ORDER

Plaintiff S. Simpson Gray brought this action pursuant to 42 U.S.C. §§1981, 1983, and 1985 alleging that his constitutional rights were violated when, after five years of teaching in the City University system, he was denied reappointment with tenure in the Accounting and Managerial Studies Department at LaGuardia Community College ("LaGuardia") for the 1979-1980 academic year. This denial was allegedly due to unconstitutional racial discrimination.

In the course of the discovery process plaintiff sought to discover the votes of two of the named defendants, Dr. Martin Moed, and Dr. Randall C. Miller, with regard to Mr. Gray's reappointment and/or promotion with tenure. When Dr. Moed and Dr. Miller refused to answer questions with regard to their votes plaintiff moved pur-

suant to Rule 37 of the Fed.R.Civ.P. to compel their responses. On September 28, 1979 plaintiff's motion and defendants' cross-motion for a protective order were referred by this Court to Magistrate Ruth Washington to hear and recommend. In a Report and Recommendation dated April 7, 1981 Magistrate Washington recommended that the Court order defendants Moed and Miller to respond to the questions regarding their votes on plaintiff's requests for promotion and/or reappointment with tenure. The defendants duly filed objections to Magistrate Washington's report urging the Court to protect the information sought pursuant to a qualified privilege under F.R.E. Rule 501. In addition, plaintiff filed a brief urging adoption of the Magistrate's report, and the Committee on Legal Affairs of the City University of New York filed a brief as amicus curiae urging reversal.

The Court is thus faced with the question whether it should order defendants Moed and Miller to answer plaintiff's questions with regard to how they each voted with regard to plaintiff's applications for promotion and/or tenure, or whether it should protect the confidentiality of those votes, either by recognizing a qualified privilege asserted by the defendants with regard to such votes or as a matter of the Court's discretion to limit and control discovery.

For the reasons that follow herein this Court reverses the Magistrate and declines to order defendants Moed and Miller to respond to plaintiff's questions.

Tenure Provisions

This case arises in the context of a New York statute, N.Y. Education Law §6206-b(3), which provides that "the permanent instructional staff shall consist of all per-

sons employed on an annual salary basis in the community colleges sponsored by the board . . . who after serving on an annual salary in any of the positions enumerated . . . for five full years continuously, have been appointed or shall be appointed for a sixth full year." Thus, a member of the teaching staff, such as Mr. Gray, must either be denied renewal of his contract after that fifth teaching year, or receive tenure. The Board's reappointment of a teacher for a sixth year without an express grant of tenure will result in a grant of tenure by operation of law. *See* N.Y. Education Law §6206-b.

It is settled that a non-tenured teacher has no vested right to continuity of employment and has no vested expectation of tenure. *See Board of Regents* v. *Roth*, 408 U.S. 564, 577-78 (1972). With regard to the provisions as to the grant of tenure to secondary school teachers, which are equivalent in substance to N.Y. Education Law §6206-b, the New York Court of Appeals has held that the Education Law vests authority to make tenure decisions in the Board of Education; that a non-tenured teacher may be refused tenure without reasons being given therefor; and that a collective bargaining agreement in which the school board purports to surrender its right to terminate the employment of a teacher at the end of his or her probationary period without giving reasons was void as against public policy. *Cohoes City School District* v. *Cohoes Teachers Association*, 40 N.Y.2d 774, 390 N.Y.S. 2d 53, 55-56 (1976).

Section III of the Statement of the Board of Higher Education on Academic Personnel Practice in the City University of New York (effective January 1, 1976) ("Statement") sets out personnel review policies for all of the colleges controlled by the Board of Higher Education.

It states that "[t]he Board reaffirms the Commission's insistence that the decision to reappoint and the decision to tenure are two separate and distinct acts. Similarly, the Board reaffirms its position that no appointment carries with it the presumption of reappointments or of eventual tenure." In Section IV, the Statement provides that "[t]he decision to grant tenure shall take into account institutional factors such as the capacity of the department or college to renew itself, the development of new fields of study, and projections of student enrollment."

Further, the Board of Higher Education Personnel and Budget Procedures dated December 18, 1967 state in Point 2:

> "At every step in the appointment and reappointment procedure, it should be made clear to the candidate and to all concerned that, until the candidate gains tenure under the provisions of the statute and the bylaws of the Board, each appointment is for one year, there is no presumption of reappointment, and no reasons for non-reappointment need be given.
>
> * * *
>
> "[T]he necessity to give reasons for non-reappointment, with the consequent receipt of rebuttals, explanations and submission of contrary expert opinion, places the college and its P&B committees in the position of defendant rather than judge. College officials would soon find their time, energies and talents dissipated in disputes. Academic excellence could not thrive in that atmosphere and a premium would be placed on peaceful mediocrity. Often the reasons have nothing to do with the candidate himself (he may indeed be satisfactory), but rather with the possibility that better candidates, with wider backgrounds, more versatility, or specialties which are more likely to be of use to the department in the years to come, may be available, and the department

> does not desire to foreclose the opportunity to attract such candidates. More importantly, any requirement that reasons be given for non-appointment would have the effect of instituting a type of presumptive tenure inimical to the conduct of the colleges as institutions of higher learning."

Although a non-tenured teacher may be denied reappointment with tenure for any reason or in the absence of stated reasons, an exception is made where it has been established that the dismissal was for constitutionally impermissible reasons. *Cohoes City School District, supra,* at 55. The plaintiff in this case contends that his termination at LaGuardia after his fifth year of teaching was motivated by such impermissible reasons.

The Right to Discovery

Fed.R.Civ.P. Rule 26(b) states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as any "evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Finally, Rule 501 of the Federal Rules of Evidence deals with privileges. It provides that "[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in the rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." According to the Supreme Court,

the Congress, in enacting F.R.E. Rule 501, intended to avoid freezing the law of privilege, in order to " 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis' and to leave the door open to change." *Trammel* v. *U.S.*, 445 U.S. 40, 47-48 (1980).

Any finding that information is protected from discovery must reflect a balancing between, on the one hand, the parties' right to discovery, which stems from society's interest in a full and fair adjudication of the issues involved in litigation and, on the other hand, the existence of a societal interest in protecting the confidentiality of certain disclosures made within the context of certain relationships of acknowledged social value.

Wigmore specifies four fundamental conditions which he asserts are necessary to the establishment of a privilege against the disclosure of communications. First, the communications must have been made with the understanding that they would not be disclosed. Second, the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties. Third, the relationship must be one which, in the opinion of the community, ought to be sedulously fostered. Fourth, the injury that will inure to the relationship by virtue of the disclosure of the communications must outweigh the benefit that would result from forcing a witness to disclose the information. WIGMORE, EVIDENCE, §2285 at 527. The courts have looked to these or similar criteria in numerous cases. *See, e.g., Robinson* v. *Magovern*, 83 F.R.D. 79, 88 (W.D. Pa. 1979).

In making its appraisal of the benefit likely to be gained by disclosure of communications as to which a claim of privilege is asserted the court must consider whether the desired information is available from other sources;

whether the desired information goes to the heart of the matter at issue; the degree of harm that would be caused by disclosure; and the type of controversy before the court. (The court will more readily compel disclosure of facts and materials necessary to the conduct of a criminal investigation or grand jury proceeding than to compel production of materials that are not central to the resolution of a civil action when requested to do so by civil litigants.) *See Zerilli* v. *Smith*, 49 U.S.L.W. 2660 (D.C. Cir. 4/13/81); *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977); *Baker* v. *F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *In re Franklin National Bank Securities Litigation*, 478 F.Supp. 577, 582 (E.D.N.Y. 1979); *Lora* v. *Board of Education*, 74 F.R.D. 565 (E.D.N.Y. 1977); *Richards of Rockford, Inc.* v. *Pacific Gas & Electric Co.*, 71 F.R.D. 388, 390 (N.D. Cal. 1976); *Apicella* v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78, 80, 82, 85 (E.D.N.Y. 1975); *McKillop* v. *Regents of University of California*, 386 F.Supp. 1270 (N.D. Cal. 1975).

In recent decisions a number of courts have applied these principles in obeying the admonition of *Trammel* v. *U.S.*, *supra*, at 47-48, to allow the development of rules of privilege on a case-by-case basis. These courts have either found that in the circumstances of those cases an evidentiary privilege should exist to protect information not otherwise protected under the traditional law of privilege or that the court, pursuant to its discretion to limit and control discovery under Fed.R.Civ.P. Rule 26(c), would not order the production of the requested information. *See*, for example, *Zerilli* v. *Smith*, 49 U.S.L.W. 2660 (D.C. Cir. 4/13/81) (qualified reporter's privilege in civil cases); *Rosario* v. *New York Times*, 84 F.R.D. 626 (S.D. N.Y. 1979) (finding existence of a qualified privilege of

"self-examination" and an editorial privilege); *Lloyd* v. *Cessna Aircraft Co.*, 74 F.R.D. 518 (E.D. Tenn. 1977) (Court ordered answers to limited questions, but held that the Government could not inquire as to details of discussions or events which took place at self-evaluative staff meetings, or as to the contents of any records, reports, memoranda or minutes which may have resulted from any such meeting); *Richards of Rockford, Inc.* v. *Pacific Gas & Electric Co.*, 71 F.R.D. 388 (N.D. Cal. 1976) (protecting confidentiality between academic researchers and their sources; decision based on the court's supervisory powers over discovery); *McKillop* v. *Regents of the University of California*, 386 F.Supp. 1270 (N.D. Cal. 0975) (protecting confidentiality of documents in tenure files on basis of official information privilege); *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971) (protecting reports containing self-analysis and evaluation of company's actions in the area of equal employment opportunities); *Bredice* v. *Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973) (protecting confidentiality of hospital staff review committee meetings).

The Court will examine the claim of privilege asserted by the defendants in this matter in light of the foregoing principles.

The Peer Review System for Granting Tenure

Academic freedom is a value which the Supreme Court has found to be of constitutional significance. In *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967), the Court stated that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . . That freedom is therefore a special

concern of the First Amendment." In addition, in his concurring opinion in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 236 (1957), Justice Frankfurter suggested that there should be recognized "four essential freedoms" for an institution of higher education: the freedom "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

The tenure system is an essential linchpin in the commitment to safeguard the academic freedom of individual teachers. The 1940 *Statement of Principles* of the American Association of University Professors recognized the importance of a tenure system to the maintenance of academic freedom. It provided:

> "Academic freedom requires that a professor should receive effective protection of his economic security through a tenure system which should provide at least these safeguards:
>
> 1. A probationary period of stated length, the maximum conforming to a national standard.
>
> 2. A commitment by an institution of higher education to make a decision in advance of the end of the probationary period whether a permanent relationship will be entered into; collaterally, national standards of notice for such decisions.
>
> 3. Appointment to a tenure post if a person is continued beyond the limit of the probationary period.
>
> 4. Termination of a tenure appointment only because of age under an established retirement system, financial exigency, or adequate cause."
>
> L. JOUGHIN, ACADEMIC FREEDOM AND TENURE (University of Wisconsin Press 1967) at 5-6.

The peer review system of decision making with regard

to the granting or withholding of tenure is intended to ensure that academic considerations will be of primary concern in the decision whether or not to grant tenure, and has been said to embody "the essence of academic freedom." *Kunda* v. *Muhlenberg College*, 621 F.2d 532, 547 (3d Cir. 1980). "The peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution." *Kunda, supra*, at 548.

The maintenance of the confidentiality of the decision-making process is generally an integral element of a peer review system for granting or withholding tenure. *McKillop* v. *Regents of the University of California*, 386 F.Supp. 1270, 1276 (N.D. Cal. 1975) ("Plaintiff's suggestion that full disclosure encourages more thoughtful and honest tenure evaluations represents a somewhat utopian view of human relationships."). *See*, Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 CALIF. L. REV. 1538, 1551-52 (1981). In an affidavit submitted in support of defendants' objections to Magistrate Washington's Report and Recommendation in the case at bar, David B. Rigney, Vice Chancellor for Legal Affairs of the City University of New York stated:

> "4. It is University policy . . . that the 'substance or even the nature of the discussion' at meetings of college or department promotion and budget committees be held in strict confidence by the members. It is professional misconduct for a member of such a committee to reveal such information.
>
> 5. The policy of confidentiality was adopted because personnel actions are based on professional peer judgments where utmost frankness is required. The Max-Kahn Memorandum stated, 'There is little

> likelihood that leaders in the world of scholarship and college teaching will give us the benefit of their candid opinions of colleagues in their fields if they cannot be assured of confidentiality.' "

The Personnel and Budget Procedures, dated December 18, 1967, state in §B(1)(a) that voting at personnel and budget committee meetings with regard to reappointment, promotion, and tenure "should be by secret ballot."

The secret ballot has long been regarded as essential to any voting process which is to be free of influence and pressure from those with power and/or influence over those voting. In *U.S.* v. *Executive Committee of the Democratic Party of Greene County, Ala.*, 254 F.Supp. 543 (N.D. Ala. 1966), the court stated that "[t]he secrecy of the ballot is one of the fundamental civil liberties upon which a democracy must rely most heavily in order for it to survive." This view was recognized by Congress in its passage of the National Labor Relations Act. That Act, specifically 29 U.S.C. §§159(e)(1) and 179(b), requires that employee votes to rescind designation of a labor organization as the employees' bargaining agent, or to accept or reject a settlement proposal, must be conducted by secret ballot. The requirement of "complete secrecy of the ballot cannot be waived." *Magic Pan, Inc.* v. *N.L.R.B,*. 627 F.2d 105, 109 (7th Cir. 1980). *See also N.L.R.B.* v. *Groendyke Transport, Inc.*, 372 F.2d 137, 141-42 (10th Cir.), *cert. denied*, 387 U.S. 932 (1967).

While it is certainly true that generally those voting on tenure decisions are not concerned about reprisals from those about whom they must make judgments, the maintenance of secrecy in the voting process is nevertheless of great value. It is not difficult to perceive that the failure to maintain the confidentiality of votes on tenure decisions would tend to promote divisiveness among faculty mem-

bers, and could well lead to Department Chairmen and those with greater influence exerting a disproportionate impact on such decisions. In fact, if the process for awarding tenure did not require that voting occur by secret ballot, plaintiff's argument that Drs. Moed and Miller might have unduly influenced the other members of the committee through their votes would be more convincing.

Having concluded that the preservation of the confidentiality of voting with regard to tenure decisions is of value to society; that the communications made during such decision-making were made in reliance on the expectation that they would not be disclosed; that the element of confidentiality is necessary to the promotion of professional and harmonious relationships between the parties; and that the relationship is one which ought to be fostered, this Court must decide whether the anticipated adverse consequences to the faculty peer review system that would be apt to follow from mandated disclosure of the information requested by plaintiff outweighs the benefit to be gained by the individual litigant as a result of such disclosure.

Discovery of defendants' individual votes with regard to his reappointment, promotion, and tenure is, to be sure, certainly not the sole avenue by which plaintiff can obtain evidence in support of his claim that his constitutional rights have been violated. Plaintiff has already been given the number of votes cast for and against his reappointment and promotion (see affidavits of Martin G. Moed and Ronald C. Miller, dated May 12, 1981). He also has the reports and evaluations, some positive and some negative, on which the tenure decision presumably rested. In addition, plaintiff has access to and in fact has presented the Court with some statistical and historical

data which may show disparate treatment of minority group members in faculty hiring, promotion, or grants of tenure, both at LaGuardia and throughout the City University system.

It is also not clear to the Court that the specific information sought by plaintiff even addresses the matter at issue. It is unclear in what way knowledge of specifically *who* voted for or against plaintiff's retention will clarify the motivation—either proper or improper—for the committee vote. Further, plaintiff specifically alleges that the denial of tenure was the result of a negative evaluation of his performance prepared by defendant Professor Miller. Thus, if Professor Miller voted in the negative, this would simply be consistent with his stated opinion as to plaintiff's qualifications for tenure; on the other hand, a positive vote would certainly not prove that the committee was improperly motivated by plaintiff's race when it voted to deny him tenure.

While the protection of the constitutional rights of individual litigants is of serious concern to society, the matter before the Court is neither a criminal investigation nor a grand jury proceeding in which the courts will most vigorously enforce society's need for information despite assertion of a qualified right to confidentiality which does not fall readily into one of the traditionally recognized privileges against disclosure. This action is also not an isolated one, but is of a type that is brought frequently in this Court. A decision by this Court to the effect that defendants' individual votes with regard to plaintiff's application for reappointment, promotion, and tenure are subject to discovery, could therefore have a substantial impact on expectations of confidentiality and, consequently, on the decision making process which relates to grant-

ing or withholding tenure.[1]

Conclusion

In light of the foregoing, the Court concludes that in weighing the potential effects of ordering disclosure, against the potential benefits of disclosure, the scales tip decidely toward the protection of the confidentiality of the faculty peer review system which it views as embodying a broader societal value. The Court therefore reverses the Report and Recommendation of Magistrate Washington, filed April 7, 1981, and declines to order defendants Moed and Miller to answer plaintiff's questions with regard to their individual votes on plaintiff's application for reappointment, promotion and tenure—both because the secret tenure votes here meet the criteria for the application of a qualified privilege as they are set out in the case-law noted above,[2] and as a matter of the Court's discretion to limit and control discovery.

The parties are directed to appear before the undersigned for a pretrial conference on Tuesday, December 8, 1981 at 9:30 a.m. in Courtroom 706.

SO ORDERED.

Dated: November 9, 1981.
New York, New York

/s/ LAWRENCE W. PIERCE
LAWRENCE W. PIERCE
U. S. D. J.

FOOTNOTES

[1] The Court's decision need not reflect approval of every judgment regarding tenure that is reached through the faculty peer review system at issue here in order to endorse the view that this system is one of such overall value to the goal of academic freedom and to society that its confidentiality should be protected in the absence of a showing of compelling circumstances to the contrary.

[2] The Court is aware of the case of *Blaubergs v. Board of Regents of the University System of Georgia*, C.A. No. 79-42-Ath. (M.D. Ga. 5/8/80), in which the District Judge ordered a professor to reveal his vote at a tenure committee meeting. The Court has considered that opinion in assessing the balancing process which this Court views as necessary to its decision on the discovery issue which it faces in the matter at bar.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 17 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1714

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES A. DINNAN,

Petitioner

v.

MAIJA S. BLAUBERGS,

Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Andrew H. Marshall
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404/546-1393
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Petitioner

QUESTIONS PRESENTED

I.

Whether a common law, statutory, or constitutional "academic freedom" privilege exists by which university promotion decisions may be shielded from judicial scrutiny.

II.

Whether an "academic freedom" privilege should be created in this case.

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STATEMENT OF THE CASE

Maija Blaubergs, a non-tenured assistant professor at the University of Georgia, filed suit under 42 U.S.C. §1983 and under Title VII of the Civil Rights Act of 1964, alleging unlawful discrimination in her failure to obtain the rank of associate professor with tenure. Defendants include the Board of Regents, the President of the University of Georgia, and other University officials.

During the course of discovery, petitioner was deposed in connection with his service on a College of Education Review Committee which recommended that Blaubergs' promotion application not be forwarded for further consideration. Appearing at the deposition without counsel, Dinnan refused to disclose how he had voted on the matter; no claim of privilege was made despite a stipulation which required claims of privilege to be invoked.

Pursuant to the operative policy in the district court requiring documented evidence of attempts to resolve discovery controversies before motions to compel are submitted, communications ensued between counsel for Blaubergs and counsel for Dinnan. When it was indicated that Dinnan would not testify without a court order, a motion to compel discovery was filed.

A hearing on the motion was duly held at which Dinnan appeared with counsel, along with another promotion process participant who had refused to give requested deposition testimony. The district court rejected Dinnan's contentions that the testimony sought was irrelevant and ordered him to testify. Petitioner thereafter failed to seek a protective order or other relief excusing his refusal to testify, and at the continuation of the deposition, he refused to obey the court's order. At the hearing on motion for imposition of sanctions, and after Dinnan was afforded another opportunity to purge himself of contempt, the court ordered Dinnan to pay a fine of $100.00 per day for a period of thirty days, following which he was to begin service of a ninety-day term in custody; the order was framed to allow for immediate cessation of the fine and/or imprisonment at such time as Dinnan agreed to testify. The implementation of the custodial portion of the sanctions was delayed for the express purpose of allowing Dinnan to seek stays of the court's order. Motions for stay were made and denied by the United States Court of Appeals for the Fifth Circuit and the United States Supreme Court.

There is no Board of Regents or institutional regulation requiring a secret ballot procedure in the promotion process, or which in any way justifies Dinnan's position in this case.

Neither the Board of Regents, nor the other party defendants--
all of whom are responsible University officials--have asserted that disclosure of Dinnan's vote on the promotion application violates any institutional requirement, and those parties have not asserted any institutional privilege in this regard, nor have they claimed that any value of "academic freedom" is implicated herein.

In affirming the district court's orders compelling discovery and imposing sanctions, the Fifth Circuit ruled that no legitimate issue of academic freedom was raised. Acceptance of the contrary view, declared the court, required a "gross distortion of the facts."

REASONS FOR DENYING THE WRIT

I.

NO COMMON LAW, STATUTORY, OR CONSTITUTIONAL "ACADEMIC FREEDOM" PRIVILEGE EXISTS TO SHIELD UNIVERSITY PROMOTION DECISIONS FROM JUDICIAL SCRUTINY.

In evaluating the claim for an "academic freedom" evidentiary privilege, it is appropriate to observe that as a general proposition, the federal court is governed by existing common law privileges, and those established by Congress and by the United States Supreme Court. Rule 501, Federal Rules of Evidence.

In resolving questions of privilege, the court applies the same rules to discovery proceedings as are applicable at trial. United States v. Reynolds, 345 U.S. 1; Rule 1101(c), Federal Rules of Evidence.

Without question, there is no common law privilege like the one claimed, nor has Dinnan produced an Act of Congress, or a rule or ruling from the court establishing such a privilege. It is pertinent to note that the 1972 amendments to the Civil Rights Act of 1964 removed the exclusion of educational institutions from the operation of Title VII upon a Congressional Declaration that discrimination against women in the

field of education is as pervasive as discrimination in other areas. Section 3, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972), codified at 42 U.S.C.S. §2000(e-1)(Supp. 1975); H. Rep. No. 92-238, 92d. Cong. 2d Sess., reprinted in [1972] U. S. Code Cong. & Admin. News, at 2155. The question thus becomes whether this case is an appropriate vehicle for this Court to consider creating a new evidentiary privilege.

II.

THE COURT SHOULD NOT CREATE AN "ACADEMIC FREEDOM" PRIVILEGE BY WHICH ALLEGED UNLAWFUL EMPLOYMENT DISCRIMINATION CAN BE SHIELDED FROM JUDICIAL SCRUTINY.

While the Federal Rules of Evidence retain sufficient flexibility for the creation of new evidentiary privileges, this Court should not entertain the application for creation of an "academic freedom" privilege for a number of reasons. In the first place, courts are traditionally hostile to the creation and extension of evidentiary privileges because of the recognition that the development of the facts and the corresponding search for truth is thereby impeded. Thus, "exceptions to the demand for every man's evidence are not lightly created

nor expansively construed ..." United States v. Nixon, 418 U.S. 683 (1974).

Creation of an "academic freedom" privilege would also run counter to sound policies reflected in the discovery portion of the Federal Rules of Civil Procedure. Those rules authorize wide-ranging efforts to obtain that which is "relevant to the subject matter involved in the pending action," without judicial supervision, Rule 26(b)(1), Federal Rules of Civil Procedure, while at the same time affording the district court with ample discretion to control and where appropriate, to limit discovery. No claim is made that the testimony sought is not within the scope of discovery, nor did petitioner utilize the protective order machinery in an attempt to limit discovery. If there were legitimate interests of "academic freedom" in this case, it is submitted that petitioner had a duty to bring those to the attention of the district court through an application for protective order. Despite the fact that some six weeks elapsed between the original deposition and the hearing on motion for contempt sanctions, Dinnan continues to implausibly claim that procedural irregularities deprived him of an opportunity to gather evidence in support of his contentions.

The balancing test suggested by petitioner would place an intolerable burden on the litigation process by

reversing the logical progression of judicial decision-making which takes place after the full and complete investigation and development of the facts. Establishing the balancing test like the one suggested would create, not eliminate, mischief in the courts for it would require that potentially critical judgments be made before the facts are in. To require the court to engage in a balancing test in university employment discrimination cases would also disserve important interests of judicial economy and would encourage an essentially non-productive diversion of energy from more important pursuits. This is particularly true in the employment discrimination area where litigants typically possess limited resources.

The paltry record on which the claim of privilege is based is yet another reason why the petition should be denied. This record is patently insufficient for meaningful review of the alleged interests of academic freedom which petitioner purports to represent. Nevertheless, it is clear that there is no Board of Regents or other university-established procedure to support the privilege claimed. Indeed, documentary evidence tendered by Dinnan established that the chairman of the committee in question suggested as an informal operating procedure that the secret ballot be used. Interestingly, the chairman was deposed and answered all questions put

to him, including how he voted on Blaubergs' promotion application.

Dinnan's claim of privilege is pervaded by logical deficiencies, in additional to the legal and factual ones. Dinnan testified about the consideration of Blaubergs' application by the committee but refused to disclose how he voted on it. Assuming for the sake of argument that there are legitimate values of academic freedom implicit in university employment decisions, e.g., "confidentiality," and assuming that a privilege is to be created by which some aspect of the employment decision-making process may be shielded from scrutiny, there is no logical basis for sheltering nothing more than an alleged "secret ballot." Because Dinnan waived any privilege concerning other aspects of his service on the promotion committee by testifying about it, however, he is necessarily limited to claiming an evidentiary privilege concerning his vote alone. The court has ample authority and discretion to protect and preserve legitimate interests of litigants and witnesses through its power to control discovery. On the other hand, Dinnan suggests the creation of an amorphous, ad hoc balancing test which is inconsistent with principled decision-making. In essence, Dinnan's claim of privilege is nothing more and nothing less than a product of his individual views about what is properly asked of him as

a potential witness in a federal lawsuit.

The request for a new privilege and the assertion of the interests of the academic community which are implicated therein must be viewed in the context of a particular deposition-discovery process which proceeded in a completely cooperative way without judicial supervision over a number of months. Every individual defendant and numerous other promotion process participants were deposed without a claim of privilege being raised and without the cry of academic freedom. In striking contrast to Dinnan's claim about the importance of this case to the academic community, which is based on selected magazine and newspaper articles, the responsible parties, who are defendants in this action, lacked sufficient interest in the alleged value of the secret ballot or in the creation of the "academic freedom" privilege to warrant a single word of support despite the opportunity to do so at two depositions, three hearings and a pre-trial conference in the district court, and in Dinnan's appeal to the Fifth Circuit. If there is a legitimate value of "academic freedom" implicit in university employment decision-making, such an interest can be accommodated in ways other than the creation of a new evidentiary privilege.

While petitioner asserts that certiorari should be granted to

resolve this "frequently recurring problem," he has cited a grand total of one other case that has any arguable similarity to this one, Gray v. Board of Higher Education, ____ F.Supp. _____, 50 U.S.L.W. (S.D. N.Y. 1981). This decision was principally bottomed on the court's discretionary power to control discovery as is evident from a consideration of the decisions relied upon therein, none of which recognize anything like the "academic freedom" privilege claimed here. It is respectfully submitted that if the problem proves to be a recurring one in the future, the court can obtain the benefit of analysis undertaken by other federal courts; such an approach is far more consistent with the appropriate discretionary exercise of the court's certiorari jurisdiction.

The most important reason for rejecting the claim of privilege was delineated in the thoughtful and well-reasoned decision of the Fifth Circuit in this case. Recognizing a privilege like the one claimed has ominous implications for a nation whose law and whose social policy prohibits employment discrimination. The effect of creating a new privilege will be the denial of meaningful constitutional and statutory protection for a significant portion of the citizenry, for if university officials can shield employment decisions from judicial scrutiny, they will have acquired a license to discrminate without accountability.

The balancing test suggested would create another obstacle--and conceivably an insurmountable one--to proof of employment discrimination within academia, contrary to well-established precedent and to the Congressional determination to authorize and direct district courts to entertain such claims.

CONCLUSION

Because the claim of privilege advanced here is illogical, flies in the face of a Congressional mandate and other established precedent, is unwise as social policy, and is inconsistent with the facts of this case, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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